IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELLIS WAYNE FELKER,

Petitioner,

vs.

TONY TURPIN, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and Petition for Writ of Habeas Corpus

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BRIEF *AMICI CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AND CITIZENS FOR LAW AND ORDER IN SUPPORT OF RESPONDENT

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39 pp

QUESTIONS PRESENTED

(1) Whether Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and in particular Section 106(b)(3)(E), 28 U. S. C. § 2244(b)(3)(E), is an unconstitutional restriction of the jurisdiction of this Court.

(2) Whether and to what extent the provisions of Title I of the Act apply to petitions for habeas corpus filed as original matters in this Court pursuant to 28 U. S. C. § 2241.

(3) Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution.

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INTEREST OF *AMICI CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Citizens for Law and Order (CLO) is a nonprofit corporation dedicated to encouraging law-abiding citizens to actively involve themselves in the support of law enforcement agencies and other organs of justice through educational, informational, and civic programs. CLO is committed to the principle that all citizens have a basic right to live in physical

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1. Both parties have given written consent to the filing of this brief.

safety and that victims of crime should be restored to a central position within the criminal justice system.

The present case involves an attempt to relitigate yet again a case which has already been reviewed in state and federal courts for 12 years *after* affirmance on appeal. Such extended relitigation is contrary to the interests CJLF and CLO were formed to advance.

SUMMARY OF FACTS AND CASE

Evelyn Ludlum was murdered over 14 years ago. Ellis Felker was convicted of that murder and sentenced to death over 13 years ago. Pet. for Cert. 2. The conviction and sentence have since been reviewed on appeal, two state habeas petitions, and a federal habeas petition.

On May 2, 1996, the U. S. Court of Appeals for the Eleventh Circuit denied a stay of execution and denied an order authorizing the filing of a second federal habeas petition, which is required by Section 106 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132. The next day, this Court granted a writ of certiorari and stay of execution and directed briefing of the three questions stated on page i, *supra*.

SUMMARY OF ARGUMENT

Throughout the history of habeas corpus, the availability of the writ has expanded and contracted depending on the availability of other remedies. The present legislation is fully consistent with that evolution. Congress has decided that state courts deserve greater confidence now than in the past, and so the enormous costs of extended relitigation are no longer justified to the extent they once were.

The limitation on this Court's jurisdiction to review by certiorari the decision of a Court of Appeals not to allow a successive habeas petition is a very limited one, well within Congress's Article III power. This Court still has jurisdiction to grant an original writ in successive petition cases, but that power

should, by the Court's own rules, be exercised only in "extraordinary circumstances."

The Suspension Clause, as originally understood, requires neither federal habeas for state prisoners nor habeas as a mechanism of collateral attack on judgments of courts of competent jurisdiction. The only colorable argument that it requires either today is the contention that this provision has somehow "evolved" to mean something different than it did when it was enacted. Whatever justification there may be for such constitutional evolution in other contexts, this notion should not be applied to the question of when, by whom, and how many times a criminal judgment should be reviewed. This decision has always been within the legislative power to make.

ARGUMENT

I. The new legislation is fully consistent with the historical evolution of habeas corpus.

Habeas corpus legislation has, from the formation of the federal courts, consisted largely of a simple authorization to issue the writ, with few or no directions on when it should issue. See *Ex parte Watkins*, 3 Pet. 193, 201 (1830). In the legislative vacuum, the task of defining when an application should be entertained and when relief should be granted has fallen largely to the judiciary, sometimes with reference to the common law, see *id.*, at 201-202, sometimes with reference to precedent, see *Wright* v. *West*, 505 U. S. 277, 300-301 (1992) (O'Connor, J., concurring in the judgment), and sometimes with no explanation at all. See *Brown* v. *Allen*, 344 U. S. 443, 467-474 (1953) (proceeding to redetermine legal questions *de novo*, no reason given). The policy-making role thrust by default upon the judiciary has produced some heated dissents. See, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 326-327 (1989) (Brennan, J., dissenting); *McCleskey* v. *Zant*, 499 U. S. 467, 506 (1991) (Marshall, J., dissenting).

With the passage of the landmark legislation now before the Court, the principal policymaker has at long last spoken. The character of the questions in this case, therefore, are far different from those in *Wright* v. *West*, *supra*, or *Keeney* v. *Tamayo-*

Reyes, 504 U. S. 1, 10 (1992). The question is not what *should* be done, but whether Congress had the authority to do what it did.

The wisdom of legislation is not a subject for judicial review. Even so, because of the vehement denunciations that always meet proposals for reform in this area, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970), it is worth noting at the outset that this historic legislation is fully consistent with the historical evolution of habeas corpus.

The historical path is neither smooth nor straight. The availability of habeas corpus has expanded at some points and contracted at others. There has been, however, one discernable constant among the variables, sometimes expressly stated and sometimes implicit. The availability of habeas corpus to remedy an allegedly illegal or unjust imprisonment has depended upon the existence of alternate remedies and the policymaker's confidence in them.

The earliest statement of this principle can be found in *Bushell's Case*, 124 Eng. Rep. 1006 (1670). As is well known, the jurors in the politically charged trial of William Penn and William Mead refused to convict, were fined 40 marks, and were imprisoned until they paid the fine. *Id.*, at 1006. They sought habeas relief from the Court of Common Pleas. The court found a general return, merely reciting the judgment of the committing court, to be insufficient. "But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." *Id.*, at 1007.

However, Chief Justice Vaughn carefully and expressly distinguished felony commitments, for which a general return would be sufficient. *Id.*, at 1009. "The cases are not alike; for upon a general commitment for treason or felony, the prisoner . . . may press for his tryal, . . . and upon his indictment and tryal, the particular cause of his imprisonment must appear, which proving no treason or felony, the prisoner shall have the benefit of it." *Id.*, at 1010.

Yet the only real difference between contempt and felony in this regard is the identity of the factfinder: the judge or the jury. The *Bushell* court lacked confidence in the judge acting alone in

contempt proceedings; it had full confidence in the jury. Hence an independent review on habeas was extended for contempts but denied for felonies.[2]

The First Congress provided a remedy for persons whose federal rights were denied by state courts. That remedy was a writ of error from this Court. Judiciary Act of 1789, § 25, 1 Stat. 85-87.[3] Thus, despite concern about whether the courts of some states would protect federal rights, see 1 Annals of Congress 843-844 (remarks of Mr. Madison), there was no perceived need for federal habeas for state prisoners. Congress flatly prohibited it, except for *habeas corpus ad testificandum*. Judiciary Act of 1789, § 14, 1 Stat. 81-82.

From the Judiciary Act through the Civil War, only two minor expansions of federal habeas were thought necessary. One was the "Force Act," extending the writ for persons imprisoned for carrying out federal law, Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634-635, and the other was for foreign nationals asserting rights under international law. Act of August 29, 1842, ch. 257, 5 Stat. 539. In all other respects, state court remedies, subject only to a writ of error from the Supreme Court, were thought to be adequate.

In the wake of the Civil War, Congress was rightly concerned that enactments freeing the former slaves were not being obeyed, and that existing remedies were insufficient. The Habeas Corpus Act of 1867 was therefore introduced and passed. Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 33-38 (1965); Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1101-1117 (1995).

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2. *Bushell's Case* was not generally followed, even in contempt cases, after the political passions that surrounded it subsided. See *infra*, at 22-23.

3. Contrary to some assertions, see, *e.g.*, Brief of the American Bar Assn. as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, p. 8, there *were* federal rights to be protected in the original Constitution. The Ex Post Facto Clause, U. S. Const., Art. I, § 10, cl. 1, and the supremacy of federal laws and treaties, *id.*, Art. VI, § 2, are just two examples. See *infra*, at 18 (discussion of *Ex parte Cabrera*).

After Reconstruction, Congress became alarmed that the lower federal courts were interpreting their authority under this act far more expansively than Congress had intended. The fact that some of the lower federal courts were overturning final judgments of competent courts, in violation of the rule in *Watkins*, 3 Pet., at 206, was a particular source of consternation. H. R. Rep. No. 730, 48th Cong., 1st Sess., 4-5 (1884). To correct this abuse, Congress decided to restore the appellate jurisdiction of the Supreme Court, in the confidence that this Court would rein in the lower federal courts. 15 Cong. Rec. 4710 (1884); Forsythe, *supra*, 70 Notre Dame L. Rev., at 1117-1124.

This bill did indeed have its intended effect for the remainder of the nineteenth century and the early years of the twentieth. *Ex parte Royall*, 117 U. S. 241, 253 (1886) promptly announced the "exhaustion doctrine," requiring that other remedies be exhausted before turning to federal habeas. Those remedies included a writ of error from the Supreme Court, "for final and conclusive determination," leaving nothing to be decided on habeas. *In re Wood*, 140 U. S. 278, 286 (1891), quoting *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884).

The federal prisoner cases of the same era provide a striking contrast and illustrate the alternative remedies principle. While the Supreme Court was virtually shutting down federal habeas for state prisoners with the *Royall* doctrine, it was expanding habeas for federal prisoners at a breakneck pace. The *Watkins* rule that only jurisdictional defects could be examined on habeas corpus remained in force in theory, but in practice the Court took an increasingly broad view of what was "jurisdictional." See *Ex parte Siebold*, 100 U. S. 371, 376-377 (1879) (constitutionality of statute creating offense); *Ex parte Wilson*, 114 U. S. 417, 429 (1885) (lack of indictment).

Why the difference? Federal defendants had no other remedy. This Court had no general appellate jurisdiction in federal criminal cases at the time. See 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law §2.2, p. 81, and n. 14 (2d ed. 1992).

In the late nineteenth and early twentieth century, this Court's appellate jurisdiction changed to a largely discretionary

one in both federal and state cases. *Id.*, at 83-84. This change, made necessary by the growth of the country, meant that the Court "could no longer perform its historic function of correcting constitutional error . . . and had to summon the inferior federal judges to its aid." Friendly, *supra*, 38 U. Chi. L. Rev., at 154. Thus, in *Moore* v. *Dempsey*, 261 U. S. 86, 92 (1923), habeas review in the federal district court was held to be proper, even though the Supreme Court had denied certiorari review of the case. *Id.*, at 98 (McReynolds, J., dissenting).

De novo review was not automatic, or even the norm, however. As late as 1944, this Court said, "Where the state courts have considered and adjudicated the merits of [the petitioner's] contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court *will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated.*" *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (emphasis added).

De novo review of all federal and constitutional questions decided by state courts was the rule from *Brown* v. *Allen*, 344 U. S. 443 (1953) until *Stone* v. *Powell*, 428 U. S. 465 (1976).[4] In a case of racial discrimination from a southern state in 1953, it is not difficult to see why state court remedies might be considered insufficient for the full implementation for the Equal Protection Clause. Similarly, during the criminal procedure revolution of the Warren Court years, there remained substantial resistance to the implementation of the new federal rights. See *Estes* v. *Texas*, 381 U. S. 532, 556 (1965) (Warren, C.J., concurring) (quoting state trial judge saying that the case was "not being tried under the Federal Constitution").

Stone v. *Powell* was the first major retrenchment from the virtually unlimited review created by *Brown* and *Fay* v. *Noia*, 372 U. S. 391 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). Creating an exception for exclusionary rule claims, *Stone* expressly reasserted the competence of state

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4. Whether *Brown* really stands for this rule is debatable. Compare *Wright* v. *West*, *supra*, 505 U. S., at 287-288 (lead opinion of Thomas, J.), with *id.*, at 300-301 (O'Connor, J., concurring in the judgment). Fortunately, this debate is now entirely academic.

courts to resolve federal constitutional questions. 428 U. S., at 493-494, n. 35. The *Teague* line of cases is also based in significant part on a renewed confidence in state courts. See *Caspari* v. *Bohlen*, 127 L. Ed. 2d 236, 249, 114 S. Ct. 948, 956 (1994).

Periods of expansion and contraction can similarly be seen in the availability of a second habeas review after rejection of the first petition. The common law rule was that denial of habeas relief was not *res judicata*. The reason for this rule was that there was no appeal from denial of the writ. Once appeal became available, courts began to hold that a prior denial on full consideration may be sufficient reason to deny a second application. *Ex parte Cuddy*, 40 F. 62, 65-66 (CCSD Cal. 1889) (Field, Circuit Justice); *Salinger* v. *Loisel*, 265 U. S. 224, 230-231 (1924).

Sanders v. *United States*, 373 U. S. 1 (1963) took a decidedly broader approach, opening the door to an unlimited number of habeas or section 2255 petitions so long as they stated grounds which had been neither deliberately withheld nor deliberately abandoned. See *id.*, at 17-18.

Despite its passing reference to the Suspension Clause, *id.*, at 11-12, *Sanders* was a policy choice and not a constitutional mandate. The opinion was decidedly legislative in tone: "formulation of basic rules to guide the lower federal courts is both feasible and desirable." *Id.*, at 15. When the abuses of the writ that naturally followed from *Sanders* led this Court to adopt a different policy, the dissent protested that the action was "foreclosed by the will of Congress" and not "a wise or just exercise of the Court's common-lawmaking discretion." *McCleskey* v. *Zant*, *supra*, 499 U. S., at 517. Again, this is a policy dispute and not a constitutional mandate.

In summary, the scope of habeas corpus, the degree of deference to prior adjudications, and the willingness to consider repeated applications have all varied throughout the history of the writ. None of them is carved in stone. They are questions of policy which the judiciary has decided in the absence of clear statutory rules, but which have always been within the legislative authority to alter. See *Brown* v. *Allen*, *supra*, 344 U. S., at 499 (opinion of Frankfurter, J.).

The proponents of unlimited relitigation argued long and forcefully to Congress that the reforms it was considering would be bad policy. See generally Habeas Corpus Issues, Serial No. 39, 102d Cong., 1st Sess. (1991) (numerous statements by advocates on both sides). The policy debate is over. The policymaker has spoken. The only question in this case is whether Congress exceeded its authority by placing limits on a use of habeas corpus which the common law did not permit *at all*. The answer, we will show in the parts that follow, is no.

II. Section 2244(b)(3)(E) is a valid, very limited exception to this Court's appellate jurisdiction.

> "2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned [in clause 1, defining the federal judicial power], the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such *exceptions*, and under such *regulations* as the *Congress* shall make." U. S. Const., Art. III, § 2, cl. 2 (emphasis added).

By enacting 28 U. S. C. § 2244(b)(3)(E),[5] Congress has exercised a power expressly assigned to it by the Constitution. Question 1 in this Court's order of May 3, 1996, asked whether this is unconstitutional. The answer is clearly no, both on the face of the Constitution and by thoroughly established precedent. See *Ex parte McCardle*, 7 Wall. 506, 514 (1869).

Congress has exercised its exception-making power from the very beginning of the federal judiciary, and it has done so in far broader terms than the very narrow and limited exception in the present statute. The Supreme Court's appellate jurisdiction over federal courts was originally limited to civil cases. Judiciary Act of 1789, § 22, 1 Stat. 84. There was no criminal appellate jurisdiction at all. See *Ex parte Watkins*, 3 Pet. 193, 203 (1830). There were vitally important criminal law questions at the time,

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5. "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or writ of certiorari."

such as the validity of the Sedition Act, but this Court had no jurisdiction to review them on appeal.

In federal civil cases, appellate jurisdiction was limited to cases where at least two thousand dollars was in dispute. This limitation cut off appellate jurisdiction in cases where the disputed question could not be assigned a monetary value, however important it may have been to the parties. See *Barry* v. *Mercein*, 5 How. 103, 120 (1847) (habeas for child custody).

Finally, *McCardle*, *supra*, established that Congress could take away appellate jurisdiction in a class of cases, even when it did so to prevent this Court from reaching a particular issue.

Petitioner's assertion that there is a constitutional imperative for appellate jurisdiction to resolve intercircuit conflicts, Pet. for Cert. 8, has no support in text or history. To the extent he makes a policy argument, he is making it to the wrong branch of government.

In addition to text and history, there is one more reason for great caution with regard to judicial review of Congressional limitations on jurisdiction. That reason is similar to the one stated in the recent impeachment case, *Nixon* v. *United States*, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993). Among the reasons that the Senate's impeachment procedures were held nonjusticiable was the effect such review would have on the separation of powers. "[J]udicial review would be inconsistent with the Framers' insistence that our system be one of checks and balances." *Id.*, at 12, 113 S. Ct., at 738. "Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.*, at 13, 113 S. Ct., at 739.

Although impeachment was thought to be the primary "check on the Judicial Branch by the Legislature," *Nixon*'s assertion that it was "designed to be the *only* check," *id.*, at 12, 113 S. Ct., at 738 (emphasis in original), is a bit of an overstatement. Congress's Article III power to make exceptions to jurisdiction and to regulate the judiciary is also an important check. It is good for the judiciary and the nation that Congress uses its impeachment power extremely sparingly, but in a system of checks and balances there must be some check, and control over jurisdiction provides an alternative.

When the judiciary is asked to judge the validity of a check upon itself, it is placed in the awkward position of judging its own case. Restraint is always in order when a litigant seeks to invoke the awesome power of judicial review of legislative action, see *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 501-502 (1985), but this is even more true in cases such as *Nixon* and the present case, where one of the very few constitutional checks on the judiciary is in question.

One can imagine hypothetical horribles in which Congress might transgress some other provision of the Constitution while exercising its Article III exception-making power. For example, a statute declaring that people of one race can appeal while those of another cannot would violate the Due Process Clause. See *Adarand Constructors* v. *Peña*, 132 L. Ed. 2d 158, 187, 115 S. Ct. 2097, 2117 (1995) (equal protection component, strict scrutiny). The present statute contains no suspect classifications.

An odd statute exceeding the exception-making power can be found in *United States* v. *Klein*, 13 Wall. 128 (1872). In that case Congress did not abolish jurisdiction in a defined class of cases, as in *McCardle* and the present case, but instead directed this Court to dismiss for want of jurisdiction only if the case had been decided a certain way. *Id.*, at 143. This statute violated the separation of powers. *Id.*, at 147. Jurisdiction cannot be granted for a class of cases yet divested upon a particular decision. *Ibid.* To allow jurisdiction to depend on which side prevails would be, in effect, letting the legislative branch decide the case.

The limited, neutral statute in the present case stands in sharp contrast to the one in *Klein*. For a particular class of court orders, Congress has made a policy decision that the delays inherent in appellate review impose a cost which exceeds the benefit of such review. That is precisely the policy choice that Article III empowers Congress to make. Far from upholding the Constitution, the judiciary would grievously *violate* the Constitution if it attempted to usurp for itself a decision which the unmistakable text of the document assigns squarely to another branch of government.

The writ of certiorari should be dismissed for want of jurisdiction.

III. This Court still has jurisdiction to entertain original habeas petitions, but that jurisdiction should rarely be exercised.

The statute in question removes jurisdiction for review of an order granting or denying permission to file a successive habeas petition via the methods of appeal and writ of certiorari. The statute says nothing about filing an original habeas petition in this Court. *Ex parte Yerger*, 8 Wall. 85, 105 (1869) settled long ago that removal of the regular route of appeal does not remove jurisdiction to entertain an application for an original writ.

A writ of habeas corpus for a state prisoner is an order issued to an executive officer. Such an order would normally be an exercise of original jurisdiction, and this Court's original jurisdiction is narrowly limited by the Constitution. See *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803). In habeas cases, however, this Court has looked to the practical effect of the writ rather than its form. The writ has been held appellate in nature for this purpose whenever its practical effect is to revise a decision of another court. *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Ex parte Watkins*, 7 Pet. 568, 572-573 (1833) ("*Watkins II*"); *Yerger*, *supra*, 8 Wall., at 99. Since petitioner Felker is in custody pursuant to the judgment of a court, there can be no doubt that the exercise of jurisdiction would be "appellate" within the broad meaning *Bollman*, *Watkins*, and *Yerger* gave that term.

Congress left this jurisdiction intact against a backdrop of existing statutes, rules, and practice. Rule 20.4(a) of the Supreme Court Rules provides:

> "4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.' If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show

> that *exceptional circumstances* warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. *This writ is rarely granted.*" (Emphasis added.)

A petitioner who has previously applied for permission to file in district court and been denied, as Felker has, certainly has a reason for not filing there. That reason alone, however, does not constitute "exceptional circumstances." Indeed, that will be quite the usual circumstance.

As we will discuss further in the next part, the substantive conditions for filing a successive application in the district court also apply to original applications in this Court. A denial of permission by the court of appeals is a determination that the petitioner does not meet the criteria. That determination will almost never be an appropriate one for review by this Court.

Under 28 U. S. C. § 2244(b)(2)(A), a second petition can be considered if "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable; . . . ." (Emphasis added.) *Teague* v. *Lane*, 489 U. S. 288 (1989) recognizes two categories of retroactivity on collateral review. One is for categorical exemptions from punishment, *i.e.*, cases where the act cannot be made criminal or where this punishment cannot be imposed on this defendant for this crime regardless of the procedure by which the judgment was obtained. See *id.*, at 311; *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). Few habeas cases present substantial claims along this line.

The second exception is far more often sought, but this Court has never found it applicable. It is limited to "watershed rules of fundamental fairness" which "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U. S. 227, 242 (1990) (internal quotation marks omitted; emphasis in original). This Court has repeatedly noted that "it is 'unlikely that many such components of basic due process have yet to emerge,' " *id.*, at

243 (quoting *Teague*), and this Court has yet to find one.[6] Petitions with substantial claims to qualify under the retroactive rule clause will therefore be very rare.

The other route that Congress has left open for successive petitions involves a pair of intensely fact-bound questions particularly unsuited for Supreme Court review. One involves the ability of the petitioner to have discovered the relevant facts before or during the first petition, and the other involves the strength of his claim of actual innocence. 28 U. S. C. § 2244(b)(2)(B)(i) and (ii). Both hurdles must be cleared.

Even on certiorari, a decision to take a case on such fact-bound questions is quite rare. See *Kyles* v. *Whitley*, 131 L. Ed. 2d 490, 520, 115 S. Ct. 1555, 1576 (1995) (Scalia, J., dissenting). Given the higher "exceptional circumstances" standard for original habeas, it should be expected that this Court will almost never entertain an application on this basis.

IV. Those portions of Title I which establish standards for the entertaining and disposition of habeas petitions apply to original petitions in this Court.

The authority to issue writs of habeas corpus is given to all of the federal courts and judges which have such authority by a single statute: 28 U. S. C. § 2241. Furthermore, the grounds on which these federal courts and judges can grant the writ to a prisoner are stated in subdivision (c) of that section. The early cases on original writs in this Court decided the propriety of issuing the writ, as distinguished from the jurisdiction to issue it, on the basis of the same principles which would control the decision in any court with jurisdiction. See, *e.g.*, *Ex parte Watkins*, 3 Pet. 193, 201-202 (1830) (statute does not specify, turn to the common law).

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6. Congress has expressly limited the qualifying rules to those *this Court* has found retroactive, expressing doubts about the *Teague*-exception decisions of the lower federal courts. That lack of confidence is well justified. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Maryland* v. *Grandison*, No. 92-207, pp. 3-6.

Both statutes and rules discourage original filings with appellate courts and judges and authorize refusal of the writ or transfer to the district court. See 28 U. S. C. § 2241(b); Fed. Rule App. Proc. 22 (amended, Pub. L. 104-132, § 103); Supreme Court Rule 20.4(a). Other than this, the standards have been the same in all courts. If Congress had intended to change that situation, particularly in the direction of making habeas law *less* restrictive in this Court than in district courts, it presumably would have said so.

Examining sections 101 through 106 of the new act,[7] we see both standards addressed to habeas cases generally, without specifying any court, and rules addressed particularly to district and circuit courts and judges. This first type applies to original petitions in this Court, while the second type does not.

Section 101 establishes a statute of limitation. For such a statute to vary among different courts of the United States would be highly unusual, if not unique, and nothing in the language indicates an intent to depart from the norm.

Section 102 deals specifically with appeals from the district court to the court of appeals. It has no application to original writs in this Court.

Section 103 amends the Federal Rules of Appellate Procedure, which only apply to the courts of appeals and their judges. Fed. Rule App. Proc. 1(a).

Section 104 amends 28 U. S. C. § 2254. This section has always applied to original writs in this Court by state prisoners, as Rule 20.4(a) recognizes. New subsection (d), the deference standard, is the most important change. It effectively modifies the standard for granting habeas relief. It is a partial, but not complete, return to the rule of *Ex parte Watkins*, that custody pursuant to an unreversed judgment of a competent court is not illegal for the purpose of a habeas petition. See *infra*, at 25-26. This substantive standard applies to original petitions in this Court.

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7. The state has not claimed that the special limitations in section 107 apply.

Section 105 amends 28 U. S. C. § 2255. Motions under this section must be made in the sentencing court. A 2255 motion is not a habeas petition. *United States* v. *Hayman*, 342 U. S. 205, 220 (1952). This section does not apply to habeas petitions in this Court, or any court.

Section 106 makes both kinds of rules in its changes to section 2244(b). Paragraphs (1) and (2) establish substantive rules for the consideration of successive petitions. They are phrased in general terms and not directed to any particular court. They apply to all federal habeas cases. Paragraphs (3) and (4) are directed specifically to district courts. Congress was evidently concerned about idiosyncratic application of the new law by individual district judges. Neither the language nor the problem it addresses applies to original applications in this Court.

In summary, the provisions of sections 101 through 106 which apply to original petitions in this Court are:

(1) The one-year statute of limitation. (§ 101, 28 U. S. C. § 2244(d)).

(2) The amendments to 28 U. S. C. § 2254. (§ 102):

(b) The modified exhaustion rule.

(d) The deference standard.

(e) The modified presumption of correctness.

(h) Appointment of counsel.

(i) Codification of the rule that ineffectiveness on habeas is not a ground for habeas relief.

(3) The substantive standards for when a successive petition may be considered. (§ 106, 28 U. S. C. § 2244(b)(1) and (2)).

V. The Constitution does not require federal habeas for state prisoners at all.

The final question on which this Court requested briefing was "Whether application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution." The answer is no for two reasons, either

of which is sufficient alone. We will address the first reason in this Part V and the second reason in Part VI, *infra*.

A. The Original Understanding.

The Judiciary Act of 1789 "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument, and is contemporaneous and weighty evidence of its true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 297 (1888). The Act had this to say about federal habeas for state prisoners: "*Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." § 14, 1 Stat. 82.

Between this Act and the present question, there are only three logical possibilities. Either (1) the Suspension Clause does not require habeas corpus in federal courts for state prisoners;[8] (2) the state-prisoner limitation in the Act was unconstitutional; or (3) the limitation was constitutional when enacted, but the Suspension Clause has since "evolved" so that Congress could not enact the same clause today. To establish the first possibility, it is necessary only to refute the other two.

The contemporary understanding of the Suspension Clause rests not only on the clear wording of the Judiciary Act,[9] but also from the lack of controversy surrounding it. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 626 (1992) (Souter, J., concurring) (Alien and Sedition Acts, which were hotly contested, are not authoritative guide to First Amendment). The high regard for the writ of habeas corpus at the time of the Constitution is well

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8. Duker, after examining the history of the clause, concludes the original intent was just the opposite, "to restrict Congress from suspending *state* habeas for *federal* prisoners . . . ." W. Duker, A Constitutional History of Habeas Corpus 155 (1980) (emphasis added).

9. *Marbury* v. *Madison*, 1 Cranch 137 (1803) did, of course, hold a portion of the same act unconstitutional. That case, however, involved an application that was anything but clear from the face of the language and probably never occurred to Congress.

known. See, *e.g.*, The Federalist No. 84, pp. 511-512 (C. Rossiter ed. 1961) (A. Hamilton); L. Martin, Genuine Information (1788), reprinted in 3 The Founder's Constitution 328 (P. Kurland & R. Lerner eds. 1987); T. Jefferson, Letter to James Madison, July 31, 1788, reprinted in 1 The Founder's Constitution, at 476. It is simply inconceivable that a clear and blatant violation of a cherished right would have been enacted without controversy and uniformly enforced by the courts. Yet that is what happened with this provision.

Amidst the controversies that swirled around the Judiciary Act, section 14 was a calm pool of consensus. The section was enacted by the Senate from the first draft, with only one minor amendment relating to a different writ. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 95 (1923). The main debate in the House was whether to create lower federal courts at all. See *id.*, at 123-131.

The state-prisoner limitation was invoked in *Ex parte Cabrera*, 4 F. Cas. 964 (No. 2,278) (CCD Pa. 1805). Cabrera was a secretary to the Spanish legation charged with forgery in Pennsylvania; he claimed diplomatic immunity, embodied in a federal statute. *Id.*, at 964-965. Justice Bushrod Washington, sitting as Circuit Justice, reluctantly decided the circuit court had no jurisdiction. First, he noted that the lower federal courts had no jurisdiction at all except what is conferred on them by statute. *Id.*, at 965. There is no hint that a different rule applies to habeas corpus. Section 14 of the Judiciary Act was then clear and on point. *Id.*, at 966. Judge Peters concurred. *Id.*, at 965.

Justice Washington was a member of the *Marbury* Court and obviously aware of that then-recent decision. He could not have doubted his authority to declare this limitation unconstitutional if he thought it were. It seems that the constitutionality of the limitation was clear, whatever his doubts about its wisdom. See *id.*, at 966. Accord, *United States* v. *French*, 25 F. Cas. 1217, 1217 (No. 15,165) (CCD N.H. 1812).

The state-prisoner limitation was so well settled that it did not reach this Court for over 50 years. *Ex parte Dorr*, 3 How. 103 (1845) involved a defendant convicted of treason against the

State of Rhode Island. He moved for an original writ of habeas corpus in the Supreme Court. *Id.*, at 104.

The Court held it had no jurisdiction due to the state-prisoner limitation of section 14. "Neither this nor any other court of the United States; or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness." *Id.*, at 105.

The validity of the state-prisoner limitation appears to have been universally acknowledged. *Amicus* has not found a single doubt expressed on the subject by any antebellum authority. See, *e.g.*, R. Hurd, A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus 154 (1st ed. 1858). Any contention that the Suspension Clause required federal habeas for state prisoners at the time of the Founding would appear to be utterly unsupportable.

B. The "Living Constitution."

A law review article written in anticipation of the present legislation takes the position that the Suspension Clause forbids time limits on habeas corpus petitions by state prisoners collaterally attacking their convictions. Mello & Duffy, Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates, 18 Review of L. & Social Change 451 (1991). Yet even this partisan article has to admit that the clause as originally enacted applied only to federal prisoners. *Id.*, at 462. The only ground these authors can find to make their stand is the last redoubt of judicial autocracy: the "living Constitution." *Id.*, at 472.

The Suspension Clause is not the only provision of the Constitution at issue in this case. Article I, section 1 provides "All legislative powers herein granted shall be vested in a Congress of the United States . . . ." The capacity to make the policy choices at issue in this case was originally within the legislative power. By what means did it cease to be? The Constitution has not been amended to make that change.

Justices of this Court supporting broad federal habeas for state prisoners have repeatedly insisted that the Reconstruction

Congress made that choice. See *Brown* v. *Allen*, 344 U. S. 443, 499 (1953) (opinion of Frankfurter, J.); *Fay* v. *Noia*, 372 U. S. 391, 417-418 (1963), overruled on other grounds in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991); *Butler* v. *McKellar*, 494 U. S. 407, 427-430 (1990) (Brennan, J., dissenting). Assuming this to be true for the sake of argument, does a policy choice made in a time of grave national crisis forever bind future Congresses, so that policy cannot be adjusted to meet changing times? Particularly where the critical question is confidence in state courts, see *Butler*, 494 U. S., at 430 (dissent), the policy-maker should be able to make adjustments as state courts grow more worthy of confidence.

To be sure, there are a few decisions of this Court that construe constitutional provisions to forbid practices that would clearly have been considered valid when those provisions were adopted. See, *e.g.*, *Bloom* v. *Illinois*, 391 U. S. 194, 196 (1968) (requiring jury trial for 2-year contempt punishment); *Roe* v. *Wade*, 410 U. S. 113, 174-177 (1973) (Rehnquist, J., dissenting) (numerous abortion laws in effect at time of Fourteenth Amendment).

Whatever legitimacy such decisions may have in the realm of the most intimate personal decisions, see *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 699, 112 S. Ct. 2791, 2807-2808 (1992) (lead opinion), or in striking down practices acknowledged to be tyrannical even at common law, see *Bloom*, 391 U. S., at 198-199, n. 2, the present case is one of an entirely different character. It does not concern what acts will be legal or illegal. It does not concern what protections defendants will receive at trial. It concerns only when, by whom, and how many times that trial will be reviewed, decisions which have always been within the legislative power to make.

The assertion has repeatedly been made that the constitutional mandate has "evolved" since the enactment of the Suspension Clause. See, *e.g.*, Mello and Duffy, *supra*, 18 Review of L & Social Change, at 462. What is really sought here, however, is not evolution, but the Big Bang.

No decision of this Court holds that Congress has *any* obligation to extend federal habeas to state prisoners. The principal implication that it might is a dictum in a since-over-

ruled case. See *Fay*, *supra*, 372 U. S., at 406.[10] There is no historical, textual, or controlling precedential support for an argument that Congress has less than complete authority over these matters. Cf. *Carlisle* v. *United States*, No. 94-9247, slip op., at 14 (Apr. 29, 1996).

The history of federal habeas for state prisoners is not an evolution of a constitutional doctrine but the evolution of a statutory enactment. That evolution has occurred through a combination of expansive decisions by this Court with Congress's failure to abrogate them. See *Wright* v. *West*, 505 U. S. 277, 305-306 (1992) (O'Connor, J., concurring in the judgment). But this Court's reluctance to overrule its statutory construction precedents, however dubious, is premised squarely on the fact that Congress *can* abrogate them. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989). To say at this point that these decisions have been suddenly removed from the legislative power would be playing a constitutional shell game with the American people.

In *Wright* v. *West*, No. 91-542, the proponents of broad federal habeas vehemently asserted that the question belonged to Congress and not the judiciary. Brief of the American Bar Assn. as *Amicus Curiae* 7; Brief of American Civil Liberties Union as *Amicus Curiae* 2-3; Brief of Gerald Gunther *et al.* as *Amici Curiae* 53-55; Brief of Benjamin R. Civiletti *et al.* as *Amici Curiae* 29-30. The stalemate in that case effectively told the American people that the judiciary could not help them; those seeking justice for murder victims must turn to Congress to lift capital punishment out of the habeas quicksand. They did. It did. For this Court to do an about-face now and declare that these decisions are not within the legislative power after all would be a massive breach of faith with the American people.

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10. Not only is *Fay* an overruled case, but its historical dissertation has long since been discredited. See Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31, 32 (1965); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 459 (1966).

Federal habeas for state prisoners was a subject entirely within the legislative power in 1789, and it remains so today. The Suspension Clause is inapplicable.

VI. The Constitution does not require habeas review of convictions by courts of general jurisdiction.

No legal myth has proved so persistent with so little basis as the motion that the "Great Writ" of the common law was a device for collaterally attacking convictions, not otherwise subject to review, of courts of competent jurisdiction. It quite simply was not.

Assertions to the contrary invariably cite *Bushell's Case*, 124 Eng. Rep. 1006 (1670), discussed *supra*, at 4-5. See *Fay* v. *Noia*, 372 U. S. 391, 403 (1963), overruled in *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991); Liebman, Apocalypse Next Time? The Anachronistic Attack on Habeas Corpus/Direct Review Parity, 92 Colum. L. Rev. 1997, 2042, n. 241 (1992). The fact that Chief Justice Vaughn expressly distinguished criminal trials from contempt citations, see *supra*, at 4-5; Oaks, *supra*, 64 Mich. L. Rev., at 463, 466-467, goes unnoticed in these citations. Given all the reliance placed on it by modern American writers, one would think that *Bushell's Case* was the definitive word on habeas corpus in England. It was not. In later cases we see contrary results reached and the broad language of *Bushell's Case* questioned.

In *Brass Crosby's Case*, 95 Eng. Rep. 1005 (1771), *Bushell's Case* was cited by a prisoner seeking habeas corpus to review a commitment by the House of Commons. *Id.*, at 1005, 1008. The Court of Common Pleas held it could "do nothing when a person is in execution, by the judgment of a Court having a competent jurisdiction; in such case, this Court is not a Court of Appeal." *Id.*, at 1011 (opinion of de Grey, C.J.). The Houses of Parliament were considered superior courts for this purpose, and "no other Court shall scan the judgment of a Superior Court." *Id.*, at 1014 (opinion of Blackstone, J.).

King v. *Suddis*, 102 Eng. Rep. 119 (1801) postdates the American Revolution, but it gives us a view of English law in that era, as there is no implication in this case of any recent

change. Suddis was court-martialed in Gibralter and challenged his sentence on habeas corpus. "It is enough that we find such a sentence pronounced by a Court of competent jurisdiction to inquire into the offense, and with power to inflict such punishments." *Id.*, at 123.[11]

Early American cases, both state and federal, are fully consistent with this view. Chancellor Kent states flatly that the prisoner "is to be remanded, if detained . . . by virtue of any final decree, or judgment, or process thereon of any competent court of civil or criminal jurisdiction." 2 J. Kent, Commentaries 30 (3d ed. 1836). *Riley's Case*, 19 Mass. 171, 171 (1824) held that habeas was unavailable to persons in execution, tracking the language of the Habeas Corpus Act.[12] "[I]t is clear that on the habeas corpus the court cannot look behind the sentence of the court, where the jurisdiction is undoubted." *Johnson* v. *United States*, 13 F. Cas. 867, 868 (No. 7,418) (CCD Mich. 1842).

Professor Oaks' survey of early state cases is consistent with a rule against the use of the writ to attack criminal judgments of courts of general jurisdiction. Oaks, Habeas Corpus in the States—1776-1865, 32 U. Chi. L. Rev. 243, 261-262 (1965).[13] In fact, there appear to be few attempts to use the writ for this purpose prior to 1850. *Id.*, at 261, n. 84.[14]

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11. In *Burdett* v. *Abbot*, 104 Eng. Rep. 501, 529 (1811), Lord Chief Justice Ellenborough states that the broad language of *Bushell's Case*, "without any qualification or restriction as to commitments by Inferior Courts," is doubtful.

12. The rule was different if the person was committed by an inferior court or officer acting in excess of jurisdiction. See, *e.g.*, *Geyger* v. *Stoy*, 1 Dall. 135 (Pa. 1785) (judgment by justice of the peace in case exceeding his jurisdictional amount in controversy).

13. There were some deviations in contempt cases, which Professor Oaks attributes to the lack of other remedies in such cases. *Id.*, at 263. This is consistent with the hypothesis of Part I of this brief, *supra*, at 3-9, and with *Bushell*'s distinction between contempt and criminal cases.

14. One possible explanation for the increase after that time was the growing acceptance of the idea that unconstitutionality of the underlying statute was a ground for habeas relief. See *id.*, at 263, n. 94 (citing cases from

Against this background, the great case of *Ex parte Watkins*, 3 Pet. 193 (1830) becomes even more clear. *Fay* v. *Noia*, *supra*, 372 U. S., at 407 attempted to dismiss *Watkins* as dealing with the specific jurisdictional problems of this Court. This was a transparent evasion of a clear but inconvenient precedent. *Watkins* is squarely based on general habeas principles.

The jurisdiction of this Court to entertain and issue original writs was well-plowed ground long before *Watkins*. In the famous case of *Marbury* v. *Madison*, 1 Cranch 137 (1803), Chief Justice Marshall first determined that Marbury had a right to his commission. *Id.*, at 168. That left the question of whether he had chosen the appropriate remedy, *ibid.*, which in turn had two subsidiary questions: "1st. The nature of the writ applied for, and, ¶ 2dly. The power of this court." *Ibid.* The general law question of the propriety of mandamus, *id.*, at 168-173, is thus cleanly separated from the court-specific question of power, *i.e.*, jurisdiction. *Id.*, at 173-180. That same clean, unmistakable separation can be seen in Chief Justice Marshall's habeas opinions.

Ex parte Bollman, 4 Cranch 75 (1807) was a *pretrial* application for habeas corpus by two persons held for trial for treason in the Aaron Burr plot. See *id.*, at 75-76. Addressing the jurisdictional question, Chief Justice Marshall first rejected the notion that any court of the United States had any inherent authority to issue writs of habeas corpus. *Id.*, at 93-94. That authority can only be conferred by a constitutional statute. *Id.*, at 94. The opinion then proceeds to find the jurisdiction conferred by the Judiciary Act. *Id.*, at 94-100.

Before proceeding to the constitutional question, the Court paused to consider the propriety of granting the writ. "If by a sound construction of the act of congress, the *power* to award writs of *habeas corpus* in order to examine into the cause of commitment, is given to this court, it remains to inquire, whether this be a case in which it *ought* to be granted." *Id.*, at

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the 1850's).

100 (emphasis added). It would be difficult to write the opinion to separate the two questions more clearly.[15]

After this pause, Chief Justice Marshall returned to the jurisdictional question, asking whether the statute granting the power was constitutional under *Marbury*. 4 Cranch, at 100-101. Again, we see the word "power" used in discussing the jurisdictional question.

In *Watkins*, the petitioner had been convicted by the Circuit Court for the District of Columbia, and sought habeas corpus in the Supreme Court. 3 Pet., at 201. The jurisdictional question, having been settled in *Bollman*, required only brief mention. "No doubt exists respecting the *power*; the question is, whether this be a case in which it *ought* to be exercised." *Watkins*, 3 Pet., at 201 (emphasis added). The remainder of the opinion discusses general principles, with no further mention of the original versus appellate jurisdiction issue.

Watkins notes "the celebrated habeas corpus act" and that it "excepts from those who are entitled to its benefit . . . persons convicted or in execution." *Id.*, at 202. The opinion then states the general question. "The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment be re-examined upon a writ of *habeas corpus*?" *Ibid.*

The answer, on general principles, is no. "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *Id.*, at 203.

In other words, although denial of habeas is not *res judicata*, the habeas court itself must respect as *res judicata* the unreversed final judgment of a competent court. "The judgment of a court

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15. On the merits of this question, the Court refers to the arguments of counsel. *Ibid.* Counsel cited *Bushell's Case*, *supra*, *Wood's Case*, 3 Wils.K.B. 173, 95 Eng. Rep. 996 (1771), and *Ex parte Burford*, 3 Cranch 448 (1806). See 4 Cranch, at 91-92. None of these was a collateral attack on a conviction of a crime. *United States* v. *Hamilton*, 3 Dall. 17 (1795), relied on by the *Bollman* Court, 4 Cranch, at 100, was similarly a pretrial bail case.

of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court *as it is on other courts*. It puts an end to inquiry concerning the fact by deciding it." *Id.*, at 202-203 (emphasis added). Cases where habeas was granted were distinguished on the basis that "In no one of these cases was the prisoner confined under the judgment of a court." *Id.*, at 208.

Fay's statement that *Watkins* is only authority as to this Court's power to issue the writ, and not as to other federal courts and judges, 372 U. S., at 407, is specious. This error can be seen not only in the plain wording of the opinion, 3 Pet., at 201, but also in the fact that *Watkins* was routinely followed by state and lower federal courts for its general rule. See, *e.g.*, *In Re Callicot*, 4 F. Cas. 1075, 1076-1077 (CC EDNY 1870); *Ex parte Gibson*, 31 Cal. 620, 627-628 (1867).

Nor did the constitutional nature of the claim make a difference. Watkins came back to the Supreme Court three years later on another habeas. He was imprisoned for nonpayment of a fine which he claimed was excessive in violation of the Eighth Amendment. *Ex parte Watkins*, 7 Pet. 568, 573 (1833). This was a collateral attack on a final judgment grounded squarely in an express constitutional guarantee.

Justice Story's opinion first revisits the *Marbury* problem once again, reaffirming that the jurisdiction sought is appellate and not original within the meaning of Article III. *Id.*, at 572-573. He then declined to address the merits of the Eighth Amendment claim. *Id.*, at 573-574. The judgment of the Circuit Court was binding.

Although the concept of "jurisdictional defect" was greatly stretched in the late nineteenth century, the basic rule of *Watkins* remained in effect into the twentieth. In *Matter of Moran*, 203 U. S. 96, 105 (1906), Justice Holmes, for a unanimous Court, tersely refused to consider the merits of a self-incrimination

claim. Even though constitutional,[16] his claim was not jurisdictional. No habeas review.

Habeas corpus came to be available for all constitutional claims, regardless of the availability or adequacy of other remedies, only in the middle of the twentieth century. See Bator, Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 498-499 (1963). How, then, can the Suspension Clause, adopted in 1789, entitle Felker to a type of review which neither state nor federal convicts had from 1789 through at least the 1930's, and possibly the 1940's, a span of at least 150 years? That could only be if the Suspension Clause has "evolved."

The argument against such an evolution in part IV B, *supra*, applies as well to this point. There are no precedents holding that Congress has an obligation to provide habeas corpus in a more expansive form than the common law or the Habeas Corpus Act permitted. There is no reason to create such a precedent out of whole cloth.

Relitigation of final convictions imposes a heavy cost. Policy arguments for limits are substantial. See generally, K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform (1995). This Court need not weigh them. The policymaker has done so. It has spoken. Its decision is within its constitutional authority.

VII. The petitioner does not qualify for a successive habeas petition.

Petitioner claims to seek the benefit of *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*), overruled on other grounds in *Estelle* v. *McGuire*, 502 U. S. 62, 72, n. 4 (1991),

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16. Moran was convicted in a territorial court. 203 U. S., at 103. The Bill of Rights was fully applicable. See *Thompson* v. *Utah*, 170 U. S. 343, 346 (1898), overruled on other grounds in *Collins* v. *Youngblood*, 497 U. S. 37, 51-52 (1990). One attempt to dismiss *Moran*, Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.—C.L. L. Rev. 579, 615, n. 194 (1982), appears to be oblivious to the distinction between states and territories.

but, as the Court of Appeals held, he seeks to extend that case well beyond current law. *Felker* v. *Turpin*, No. 96-1077, Part II A (CA4 May 2, 1996). The extension he seeks, if it has merit at all, "has none of the primacy and centrality of the rule adopted in *Gideon* . . . ." *Cf. Saffle* v. *Parks*, 494 U. S. 484, 495 (1990). His second claim seeks to invade the province of state evidence law in a way which this Court has repeatedly declined to do. See *Estelle* v. *McGuire*, 502 U. S. 62, 70 (1991). The facts underlying both claims were known at trial. His claim of innocence is nothing more than a request to second-guess the finder of fact regarding the credibility of witnesses. This is precisely the kind of successive petition that Congress determined should not be considered.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction. The petition for writ of habeas corpus should be denied.

May, 1996

Respectfully submitted,

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